Supreme Court
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In The

Supreme Court of the United States

October Term, 1994

ANDREW JOHNSON, INDIVIDUALLY AND AS HEIR TO AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREW GASTON, HIS DECEASED SON,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT AND DONNIE BREEDLOVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

As a result of the majority's decision below, the death of Petitioner's son, Andrew Gaston, became nothing more than the latest statistic in a long history of violent conduct at A. Maceo Smith High School. Does 42 U.S.C. § 1983 afford more protection to Andrew Gaston's imprisoned killer than to the children compelled to attend public schools in the state of Texas?

II.

In affirming the dismissal of Petitioner's lawsuit for failure to state a claim, did the majority below fail to apply the standard of review pronounced by this Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*?

III.

In addition to claims based upon a violation of 42 U.S.C. § 1983, Petitioner also asserted contractual claims against respondents for breach of express and implied warranties under state law. Did the majority below err because it failed to address these state law claims or because the immunity asserted by Respondents in their motion to dismiss is not applicable and does not bar liability arising out of contract?

LIST OF PARTIES

Counsel for Petitioner certifies that the following listed persons have an interest in the outcome of this case.

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ANDREW JOHNSON, INDIVIDUALLY AND AS HEIR TO AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREW GASTON, HIS DECEASED SON,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT AND DONNIE BREEDLOVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Andrew Johnson, individually and as heir to and/or personal representative of the Estate of Andrew Gaston, his deceased son, respectfully requests that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the United States District Court for the Northern District of Texas, Dallas Division, which dismissed Petitioner's suit under Rule 12(b)(6) for failure to state a claim.

OPINIONS BELOW AND JURISDICTION

On November 17, 1994, a majority of a panel of the United States Court of Appeals for the Fifth Circuit, consisting of Judges Jones, Duhé and Goldberg,[1] issued a published opinion rejecting all of the issues raised by the Petitioner and affirming the dismissal of Petitioner's action for failure to state a claim. *Johnson v. Dallas Independent School District*, ___ F.3d ___ (5th Cir. 1994) [Appendix A]. On December 14, 1994, Petitioner's petition for rehearing before the Fifth Circuit was denied [Appendix A]. This court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

A. United States Constitution, XIV, Section 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. United States Constitution, Amendment XIV, Section 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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[1] Justice Goldberg filed a dissenting opinion in which he expressed his disagreement with the majority's affirmance of the dismissal.

C. Title 42, United States Code, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

D. Federal Rule of Civil Procedure 12(b)(6):

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . .

STATEMENT OF THE CASE

On October 23, 1991, Petitioner's son, Andrew Gaston, lost his life while at a public school which he was compelled to attend by state law. On November 17, 1994, school children in the State of Texas lost their right to have school districts provide even a minimum level of safety for the students in their custody and over which the school districts exercise control.

This case arises out of the tragic death of Andrew Gaston. Andrew Johnson, Andrew Gaston's natural

father, brought suit in state court on his own behalf and on behalf of the estate of his deceased son. The original petition filed by Mr. Johnson asserted a federal claim arising out of the violation of 42 U.S.C. § 1983. Named as defendants in that lawsuit are the Dallas Independent School District ("DISD") and Donnie Breedlove ("Breedlove"), the principal of A. Maceo Smith High School at the time Andrew Gaston was gunned down. In pertinent part, Mr. Johnson alleged the following:

> On the day of Andrew Gaston's death, security measures at A. Maceo Smith High School were so inadequate that Drumestic Contreal Brown, a non-student armed with a handgun, rode the school bus to A. Maceo Smith High School, entered A. Maceo Smith High School without proper identification, instigated numerous scuffles with students of A. Maceo Smith High School, which scuffles necessitated his eviction, and had to be evicted by students rather than school personnel. Furthermore, at the time of the incident in question, metal detectors, which would have revealed the presence of the handgun being carried by Drumestic Contreal Brown before he entered the high school, were present and available for use. However, due to official policy, such metal detectors were packed away and not in service on the day in question. Moreover, at the time of the incident in question, there had been a well recognized history of violent conduct and of students carrying dangerous weapons on school property in the DISD and at A. Maceo Smith High School in particular. Student identification badges, paid for by the students, were not being properly used at the school.

> In light of the aforementioned, the policies and procedures implemented at A. Maceo Smith High School amounted to nothing less than a callous indifference to Andrew Gaston's right to be free from bodily harm when compelled by state law to attend school. Moreover, as the supervisory entity and as the individual responsible for the day to day operations of A. Maceo Smith High School, the DISD and Donnie Breedlove, respectively, were responsible for the aforementioned policies and procedures which directly and/or proximately caused Andrew Gaston's death and injuries complained of herein.

(Tr. pp. 32,33). Mr. Johnson further alleged that Respondents' conduct deprived Andrew Gaston of rights, privileges and immunities afforded under the constitution and laws of the United States, including, but not limited to the right to life and to be free from bodily harm while being compelled to be present at a DISD educational facility and that such conduct exceeded the scope of negligence and amounted to nothing less that callous indifference or intentional disregard to Andrew Gaston's rights, privileges and immunities. (Tr. p. 34). On or about January 8, 1993, Mr. Johnson filed an amended petition in state court and added pendent state law claims for breach of express and implied warranty arising out of the DISD's program of requiring students to buy identification badges in an effort to control access to school campuses. (Tr. p. 34). Even in light of these allegations, and less than a month from the time that the DISD and Breedlove removed this case to the United States District Court for the Northern District of Texas, the district court granted Respondents' motion to dismiss for failure to state a

claim under Federal Rule of Civil Procedure 12(b)(6).[2] Appeal was then taken to the Fifth Circuit, and on November 17, 1994, a majority of a three-member panel of the Fifth Circuit affirmed the judgment of the district court dismissing Petitioner's lawsuit.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

I.

As a result of the majority's decision below, the death of Petitioner's son, Andrew Gaston, became nothing more than the latest statistic in a long history of violent conduct at A. Maceo Smith High School. Does 42 U.S.C. § 1983 afford more protection to Andrew Gaston's imprisoned killer than to the children compelled to attend public schools in the state of Texas?

Petitioner alleged causes of action against Respondents under 42 U.S.C. § 1983 based upon the state created danger theory of liability and based upon the existence of a special relationship between Andrew Gaston, a child who was compelled by state law to attend A. Maceo

[2]–The record will reflect that on January 25, 1993 the DISD and Breedlove filed a motion to remove this case to the United States District Court for the Northern District of Texas and that two days later, and before the district court ruled on the propriety of the removal, the DISD and Breedlove filed a motion to dismiss Petitioner's case pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 19, 1993, less than a month from the time the case was removed to federal court, the district court granted Respondent's motion to dismiss.

Smith High School, and Respondents. The majority below affirmed the dismissal of Petitioner's lawsuit on the grounds that he failed to state a cause of action under either of these theories of liability. Because both of these theories of liability are, in the context of Petitioner's pleadings, viable means to recover under § 1983 as recognized by this Court in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the majority below erred in affirming the dismissal of Petitioner's lawsuit.

A. State-Created Danger Theory of Liability.

In addition to affirming the dismissal of Petitioner's claim based upon a standard of review which is clearly in conflict with this Court's opinion in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1992), the majority below appears to question the "constitutional soundness" of the state-created danger theory of liability. (App. 8). This questioning appears to arise from the majority's recognition that no Fifth Circuit case has yet predicated relief on such a theory and from the Fifth Circuit case of *Leffall v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994), which questioned support by this Court for such a theory of liability. However, the majority's questioning of the theory is somewhat confusing, given its discussion and statement that "When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct." (App. 4). The majority's hesitancy with regard to the viability of such a theory of liability is even more puzzling in light of its obvious awareness that the theory

has been recognized as a basis for liability under § 1983 and, in fact, the majority relied upon several cases from other circuits to distill the elements of a claim under the state-created danger theory. [App. 4-5, citing to *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *K. H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990); and *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979)].

This Court has recognized the underpinnings of the state-created danger theory of liability. In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), this Court noted that "while the [state agency] may have been aware of the dangers that [the minor] faced in the free world, it played no part in the creation, nor did it do anything to render [the minor] more vulnerable to them." *DeShaney*, 489 U.S. at 201. The state-created danger theory of liability under § 1983 is recognized and has been accepted and applied by several jurisdictions, and, to the extent that the majority below based its affirmance of the dismissal of Petitioner's claim on the grounds that such a theory is not a viable means of recovery, the majority's decision was in error and should be reversed.

B. Liability Based Upon the Existence of a Special Relationship.

In addition to asserting liability against Respondents based upon the state-created danger theory, Petitioner asserted liability against Respondents premised upon the

existence of a special relationship between Petitioner's son, Andrew Gaston, and Respondents. In addressing Petitioner's theory of liability premised upon a special relationship, the majority below recognized that affirmative constitutional obligations of care and protection do arise where a special relationship exists. (App. 10). The majority also appears to have taken the position that a special relationship could indeed be found to exist between the state and schoolchildren. (App. 12-13, fn. 7). The majority, however, refused to decide the special relationship issue in this case on the basis that it was unnecessary to do so because Andrew Gaston was shot by a non-student third party. (App. 12-14). To hold that a third party's act insulates state actors from all liability ignores a basic premise of the duty of protection based on special relationships.

The constitutional obligation to provide protection to a person in the custody of the state is not merely a duty to protect the person from state actors, but from the harm that may be inflicted on the person while in the state's custody. *DeShaney*, 489 U.S. at 201, fn. 9; see also *Falls v. Nesbitt*, 966 F.2d 375, 377 (8th Cir. 1992) (duty to protect from other inmates); *Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1141 (3rd Cir. 1990) (duty to protect from third parties or self); *DeMallory v. Cullen*, 855 F.2d 442 (7th Cir. 1988) (duty to protect from other inmates). Consequently, the single fact that a third party actually shot Andrew Gaston simply will not support the majority's holding.

The duty to provide protection to those over whom the state exercises custody and control has never been held to, nor intended to, make the state an insurer of safety as implied by the majority below. (App. 13-14).

Nevertheless, the duty most certainly requires that the state protect against known or foreseeable risks. As pointed out by the dissent below, the state need not be the last link in the causal chain to be liable for injuries. (App. 24). Given the pleading of a history of violence and weapons at the school, of security measures which were not in use or being enforced due to the official policies of Respondents, and of inadequate security measures which allowed an armed non-student to obtain access to the campus in spite of a plan to restrict such access, the question of whether Respondents were aware of or should have foreseen the risk of harm to which Andrew Gaston was exposed is certainly raised.

To the extent that the majority below found that Andrew Gaston was not in custody, such a holding is in error; too narrowly interprets *DeShaney*; and implicitly rejects the concept of a relationship and duty recognized by other Fifth Circuit cases involving students and their schools. See *Lopez v. Houston Independent School Dist.*, 817 F.2d 351 (5th Cir. 1987), and *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 480 (5th Cir. 1982). The rationale expressed by this Court in *DeShaney* for the imposition of the affirmative duty of protection was that the state's acts limited a person's freedom and ability to act or care for himself. *DeShaney*, 489 U.S. at 200. This concept of "custody" is flexible enough to encompass the relationship between a school and its students. See *Lichtler v. County of Orange*, 813 F.Supp. 1054 (S.D.N.Y. 1992); *Waechter v. School Dist. No. 14-030 of Cassopolis, Mich.*, 773 F.Supp. 1005 (W.D. Mich. 1991); *Pagano v. Massapequa Public Schools*, 714 F.Supp. 641 (E.D.N.Y. 1989). To argue that there is no special relationship between Respondents

and the students in their care flatly ignores this Court's holdings with regard to the power and authority of school officials to regulate the conduct of students receiving an education, and the environment in which such education is received. See, *e.g.*, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (regulations of expression and dress under school's authority to control environment); *Ingraham v. Wright*, 430 U.S. 651 (1977) (power and authority to prescribe and control student's conduct through imposition of corporal punishment/discipline); *Goss v. Lopez*, 419 U.S. 565 (1975) (removal of students from school is within the school's authority to prescribe and enforce standards of conduct); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (attendance at school can be compelled through threats of criminal prosecution). In allowing such intrusion into the regulation of students' lives by the schools, the courts have necessarily determined that schools have a right to limit and control the students' freedoms so that the schools can fulfill their obligations and responsibilities to provide an education in a safe environment.

The relationship between Respondents and Gaston fits within the custodial concept as delineated in *DeShaney* and as reinforced by other opinions of this Court regarding the ability of schools to restrict, regulate and control the students' freedoms in order to provide an education in a safe environment. Therefore, Respondents owed a duty of care and protection to Andrew Gaston, and the majority below should have reversed the dismissal of Petitioner's claim.

II.

In affirming the dismissal of Petitioner's lawsuit for failure to state a claim, did the majority below fail to apply the standard of review pronounced by this Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*?

Petitioner's lawsuit was summarily disposed of pursuant to a motion to dismiss for failure to state a claim. In affirming the dismissal, the majority of the three-member panel below failed to follow this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1992). The question before this Court, as was the question before the courts below, is whether Petitioner sufficiently pleaded a claim against the DISD and/or Breedlove to impose liability under 42 U.S.C. § 1983 for fatal injuries sustained by Petitioner's son while in the care, custody and control of the DISD and Breedlove. In attempting to answer this question, the majority below disregarded Petitioner's allegations, construed the pleadings unfavorably to Petitioner under a standard requiring factual detail and particularity, and accepted only those inferences which supported the dismissal. Moreover, the majority below, after articulating a "set of facts" which would allow a plaintiff to recover under § 1983 for injuries arising out of a dangerous school environment, which was adequately set forth and contained in Petitioner's pleading under proper application of the standard of review, nevertheless affirmed the dismissal entered by the district court. Such review by the majority below is in direct conflict with this Court's holding in

Leatherman and, as a result, the decision rendered by the majority below should be reversed.

Pursuant to this Court's holding in *Leatherman*, there is nothing unique about reviewing the dismissal of a § 1983 claim on the grounds that it fails to state a claim. All that is required to plead a claim under § 1983 is a short and plain statement of the claim showing that the pleader is entitled to the relief sought. *Leatherman*, 507 U.S. at ___, 113 S.Ct. at 1163, 122 L.Ed.2d at 524. It is not necessary, nor required, that the pleader state with factual and particularity the basis of such a claim. *Id.* Moreover, the appellate court, in its review of a dismissal for failure to state a claim, must accept as true the facts alleged by the pleader, *Leatherman*, 507 U.S. at ___, 113 S.Ct. at 1161, 122 L.Ed.2d at 522, and must construe the pleadings favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The majority below wholly failed to apply these rules when reviewing the facts pled by Petitioner in this case.

For example, in analyzing Petitioner's claim against the DISD and Breedlove based upon the state-created danger theory, the majority recognized that one of the elements of such theory was that the environment complained of be dangerous. (App. 6-8). In analyzing Petitioner's allegations in conjunction with this element, the majority stated the following:

> No inference of dangerousness arises simply from the presence of student ID badges or metal detectors; such devises could have been installed prophylactically, in the absence of any prior trespasses onto campus or incidents of

> criminal violence. Moreover, to infer the existence of a dangerous environment – the condition of § 1983 liability – solely from the presence of measures designed to avert violence would erect a serious disincentive to their use. The law cannot so turn against its purposes; the use of security devices should be encouraged, not discouraged. There would have to [be] allegations at least of previous criminal conduct at Smith High School from which a trier of fact could conclude it was tantamount to a "high crime area."

(App. 8). Such excerpt clearly illustrates that the majority utilized an improper standard when reviewing Petitioner's pleadings. As recognized by Justice Goldberg in his dissent below, it "does not require a great leap of faith" to draw the inference that a dangerous environment existed at the school because of the presence of metal detectors and the need for an ID badge policy. (App. 22-23, fn. 7). Moreover, this excerpt not only shows that the majority failed to make all inferences favorable to the petitioner, but also demonstrates that the majority went out of its way to make inferences disfavorable to the Petitioner and totally ignored allegations in Petitioner's pleadings. In its analysis, the majority below points out that the presence of ID badges and metal detectors could support an inference that such devices were implemented simply as a means to deter future conduct rather than combat an existing dangerous condition at the school. (App. 8). Although the inference drawn by the majority is plausible, it is one drawn to support the dismissal, rather than the pleader, and such an inference has no place in a

proper review of a dismissal for failure to state a claim. Additionally, the majority states that in order to meet this element of the state-created danger theory, "there would have to [be] allegations at least of previous criminal conduct at Smith High School from which a trier of fact could conclude it was tantamount to a 'high crime area'." (App. 8). Having made this statement, however, the majority wholly ignored the following allegations of Petitioner's pleading:

> At the time of the incident in question, there had been a well recognized history of violent conduct and of students carrying dangerous weapons on school property in the DISD and at A. Maceo Smith High School in particular.

(Tr. pp. 32, 33). Clearly, the excerpt from the majority's opinion demonstrates that the majority applied an incorrect standard when reviewing the dismissal in this case. These same errors were repeated by the majority in analyzing Petitioner's pleading in conjunction with the remaining two elements of the state-created danger theory, along with analyzing Petitioner's pleading in conjunction with liability under § 1983 premised upon a special relationship theory. As a result, the decision handed down by the majority below should be reversed and, moreover, because Petitioner's pleading sufficiently states a claim upon which relief can be granted under § 1983, this case should be remanded to the District Court for further proceedings.

III.

In addition to claims based upon a violation of 42 U.S.C. § 1983, Petitioner also asserted contractual claims against respondents for breach of express and implied warranties under state law. Did the majority below err because it failed to address these state law claims or because the immunity asserted by Respondents in their motion to dismiss is not applicable and does not bar liability arising out of contract?

In two footnotes, the majority summarily disposed of Petitioner's state law claims, apparently holding that the district court correctly dismissed such claims based upon Respondents' immunity defense. (App. 2-3, fn. 1 & 3). In his pleadings, Petitioner alleged that express and implied warranties were made in connection with the sale of an ID badge to Andrew Gaston and that those warranties were breached. (Tr. p. 34). Respondents expressly recognized that contractual claims were included in the claims asserted by Petitioner. (Tr. p. 2). The motion to dismiss asserted sovereign immunity to Petitioner's state law claims. The district court dismissed these claims with prejudice, apparently on the basis of such immunity. (Tr. p. 119).

An express warranty is an "affirmation of fact or a promise made by a seller to a buyer which relates to the subject matter of the agreement and becomes a basis of the bargain", and the standard is the same when the contract is for services instead of goods. *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991). Implied warranties outside the U.C.C. arise where public policy requires it. See *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 341, 353 (Tex. 1987); *Archibald v. Act III Arabians*,

755 S.W.2d 84 (Tex. 1988). Although a breach of contract claim and a breach of warranty claim are not necessarily the same causes of action, both are contractual in nature, as a defect in performance can be a breach of warranty. *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d at 576. See also *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355 (5th Cir. 1988) (implied warranty arising from service contract governed by contract principles); *Darr Equipment Co. v. Owens*, 408 S.W.2d 566, 569 (Tex. Civ. App. – Texarkana 1966, no writ) (implied warranty contractual in nature); *Gates Rubber Co., Inc. v. Wood*, 374 S.W.2d 785, 787 (Tex. Civ. App. – Beaumont 1968, no writ) (express warranty a matter of contract).

Respondents' only response to Petitioner's point of error on appeal to the Fifth Circuit was that everything Respondents do is a governmental function and, therefore, they always enjoy sovereign immunity. To the contrary, when the state enters into a contract, its immunity from liability is waived with regard to claims made under the contract. See *Lindsey v. State*, 811 S.W.2d 731, 733 (Tex. App. – Austin 1991, writ denied); *Industrial Construction Management v. DeSoto Independent School Dist.*, 785 S.W.2d 160 (Tex. App. – Dallas 1989, no writ). Therefore, the majority's affirmance of the district court's holding that Respondents are immune from liability for breach of warranty was incorrect.

CONCLUSION

The majority of the three-member panel below has erred in failing to reverse the dismissal of Petitioner's lawsuit. Petitioner stated a claim for relief under § 1983 under either or both theories of liability advanced in the courts below, and his state law claims are not subject to sovereign immunity. Wherefore, Petitioner prays that this Court grant his Petition for Writ of Certiorari, reverse the judgment of the appellate court below which affirmed the district court's dismissal of Petitioner's lawsuit, and remand this case to the district court for further proceedings. Petitioner prays for such other and further relief to which he may show himself justly entitled, at law or in equity.

Respectfully submitted,

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Andrew JOHNSON, Individually and as heir to and/or personal representative of the estate of Andrew Gaston, his deceased son, Plaintiff-Appellant,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT and Donnie Breedlove, Defendants-Appellees.

No. 93-1214.

United States Court of Appeals,

Fifth Circuit.

Nov. 17, 1994.

Personal representative of estate of high school student killed when he was hit in the head by a stray bullet shot by a nonstudent during a melee brought action against school district and school's principal under § 1983. The United States District Court for the Northern District of Texas, Robert B. Maloney, J., dismissed. On appeal, the Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) even assuming constitutional soundness of state-created danger theory for imposing § 1983 liability, no claim was stated in connection with death of student, and (2) even if school district were held to have "special relationship" to student, district could not be held liable under § 1983.

Affirmed.

Goldberg, Circuit Judge, filed dissenting opinion.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, JONES and DUHÉ, Circuit Judges:

EDITH H. JONES, Circuit Judge:

Andrew Gaston's last moments on earth were passed in the hallway at A. Maceo Smith High School in Dallas, Texas. He was hit in the head by a stray bullet shot during a melee instigated by the killer, non-student Drumestic Contreal Brown. The question before this court is whether Gaston had either (1) a constitutional right not to be placed in danger of deadly violence while at school or (2) a more general constitutional right to some level of affirmative protection while at school. Despite our sympathy for Andrew's untimely death, we find no constitutional damage remedy available to his family.

The § 1983 case[1] filed by Gaston's father against Dallas Independent School District and Donnie Breedlove, the principal of Smith High, was dismissed for failure to state a claim. Fed.R.Civ.P. 12(b)(6). The skeletal pleadings, our only guide to the facts, reveal few details of the incident in which Gaston died. They state that the assailant Brown somehow rode a school bus[2] to Smith High on the morning of October 23, 1991. Brown went onto campus and into the high school building although he was not wearing a student ID badge required in some

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[1] State law causes of action were also pled in the complaint, but they were dismissed on the basis that Texas law indisputably shields school districts and their employees from this kind of liability. The complaint did not assert any claim founded on the Texas constitution.

[2] DISD is quick to point out that it did not run the school bus – that service was contracted out to a private company.

of DISD's schools. Further, Brown carried a concealed handgun, which was not discovered because the metal detectors placed by DISD at the school were not being used. Brown then created a disturbance, causing students – allegedly without the aid of school employees – to attempt to evict him. Gaston was tragically in the line of fire when Brown shot his gun.

The district court's conscientiously reasoned dismissal rested on three pivotal elements of a § 1983 claim.[3] First, the court held, Gaston had no affirmative constitutional right to protection by DISD while he was at school. Second, because plaintiff had not pled that DISD's actions, custom, or policy caused Gaston's death, DISD could not be held constitutionally liable. Third, plaintiff had not pled facts sufficient to overcome principal Breedlove's assertion of qualified immunity. This court may affirm the dismissal for failure to state a claim only if "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Haines v. Kerner*, 404 U.S. 519, 520-21; 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

The epidemic of violence in American public schools is a relatively new phenomenon, but one which has already generated considerable caselaw. Whether that epidemic invokes constitutional consequences for the innocent, law-abiding students forced to attend those

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[3] This opinion discusses only the § 1983 claim because the district court ruled correctly on the other issues asserted by appellant.

schools raises grave questions that must be carefully analyzed.

To plead a constitutional claim for relief under § 1983, Gaston's father had to allege a violation of a right secured to Andrew by the Constitution or laws of the United States and a violation of that right by one or more state actors. Against the Dallas Independent School District, he had to allege that an unconstitutional custom or policy of DISD caused the violation. *See Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994). In this as in other similar cases, two potential theories of constitutional liability have been proposed. First, it may be contended that DISD and Principal Breedlove "violated [Andrew's] constitutional rights by affirmatively creating the hazardous environment" in which he attended school. *Id.* at 530. Alternatively, Andrew's father asserts that the state bore Andrew an affirmative duty of care arising from the state's compulsory attendance laws. These theories will be discussed in turn.

1. *State-Created Danger*

When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state "custody." This principle has been applied in a number of cases from other circuits. Three cases exemplify the state-created danger theory of liability. In *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990), a police officer arrested a drunken driver and

impounded his car, leaving the female passenger alone at night, without any means to go home, in a neighborhood known for criminal activity. She was raped by a stranger who offered her a lift. In *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir.1989), *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990), the state permitted a prisoner with a violent criminal history to participate in a work program at a municipal town hall under the supervision of an untrained city employee. He gained access to a knife, abducted the plaintiff who worked for the city, and held her hostage for three days. Finally, in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir.1990), the state removed a sixteen-month-old child from her parents' custody and in the next four years shuttled her among eleven foster homes, in at least two of which she was molested or abused. The court held that, if the allegations of the child's complaint were correct, state officials could be guilty of knowingly subjecting her to serious psychological damage. *See also White v. Rochford*, 592 F.2d 381, 384-85 (7th Cir.1979) (state liable for injuries to minor children left in car on side of busy highway after state officer arrested the driver). Although different facts underlie each of these cases, the courts uniformly held that state actors may be liable if they created the plaintiffs' peril, increased their risk of harm, or acted to render them more vulnerable to danger.[4]

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[4] *Compare Salas v. Carpenter*, 980 F.2d 299 (5th Cir.1992); *Bryson v. City of Edmond*, 905 F.2d 1386, 1392 (10th Cir.1990) (No liability of state for deaths of post office employees shot by fellow employee where responding police officers did not create the dangerous situation or worsen decedents' plights); *Jackson v. City of Joliet*, 715 F.2d 1200, 1206 (7th Cir.1983), *cert. denied*, 465

In contrast to these cases, but not in conflict, stands *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3rd Cir.1992) (en banc), cert. denied, ___ U.S. ___, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993), in which the Third Circuit held *en banc* that a school could not be liable for a series of sexual assaults allegedly committed against two female students in the unisex bathroom and a darkroom of the school's graphic arts class. The abuse allegedly occurred during class, virtually under the eye of a teacher trainee, two to four times weekly for an entire semester. Unlike the preceding state-created danger cases, however, the facts in *Middle Bucks* did not sufficiently demonstrate that the state placed the plaintiffs in danger, increased their risk of harm, or made them more vulnerable to danger. A classroom is not per se dangerous, nor can it ordinarily be expected that even an under-trained teacher will permit or be ignorant of sexual molestation going on in class. The risk that some students would sexually molest other students during a class was not found to be foreseeable to or known by school officials.[5]

The key to the state-created danger cases, and the essence of their distinction from *Middle Bucks*, lies in the

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U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720 (1984) (police conduct was held not the cause of the plaintiffs' injuries when officer did not know that there were occupants in a burning car and did not render aid); *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir.1990).

[5] And while the *Middle Bucks* decision does not articulate this point, it seems self-evident that the plaintiffs could have complained to their teacher or their parents, but their pleadings did not indicate that they attempted such means of self-defense.

state actors' culpable knowledge and conduct in "affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid." *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1035 (11th Cir.1987). *See also L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir.1992) (state officials knowingly assigned violent, habitual sex offender to work alone with female prison employee and did not inform her of the risk). Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff. *See Leffall*, 28 F.3d at 531 (no due process claim stated against school district or officials for holding a high school dance at which a student was shot and killed).

This court recently noted that no Fifth Circuit case has yet predicated relief on a state-created danger theory, *Id.* at 530-31. *Leffall* also questioned whether the Supreme Court voiced support for that theory of constitutional liability. In *DeShaney v. Winnebago County Dept. of Social Serv's.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Supreme Court remarked, "while the state may have been aware of the dangers that Joshua faced in the free world, it *played no part in their creation, nor did it do anything to render him any more vulnerable to them.*" 489 U.S. at 201, 109 S.Ct. at 1006 (emphasis added). *Leffall* suggested that the Court was simply placing in context its broader ruling that the state had no affirmative duty to

the young client of its welfare department. Rather than adopt or reject a state-created danger theory, *Leffall* found, in the context of a fatal shooting at a school-sponsored dance, that the school officials lacked the requisite culpability for a constitutional violation.

The approach of *Leffall* applies in this case. Even if the state-created danger theory is constitutionally sound, the pleadings in this case fall short of the demanding standard for constitutional liability. First, they posit the question whether the environment at Smith High School was "dangerous." If for no other reason, the presence of numerous trained adults would assure that a school cannot be as dangerous as the nocturnal condition of the high-crime neighborhood described in *Wood* or the prisoner release program gone awry in *Cornelius*. No inference of dangerousness arises simply from the presence of student ID badges or metal detectors; such devices could have been installed prophylactically, in the absence of any prior trespasses onto campus or incidents of criminal violence. Moreover, to infer the existence of a dangerous environment – the condition of § 1983 liability – solely from the presence of measures designed to avert violence would erect a serious disincentive to their use. The law cannot so turn against its purposes; the use of security devices should be encouraged, not discouraged. There would have to [be] allegations at least of previous criminal conduct at Smith High School from which a trier of fact could conclude it was tantamount to a "high-crime area."

Second, school officials must have actually known that Smith High was dangerous to students such as Andrew Gaston. Actual knowledge of a serious risk of

physical danger to the plaintiff has been a common feature of the state-created danger cases. From the pleadings in this case, no legitimate inference can be drawn that school officials might have been actually aware of a high risk that an armed *non-student* invader would enter the campus and fire a pistol randomly during school hours.

Appellant's claim also fails that third element of the state-created danger cases. There is no pleading that school officials placed Gaston in a dangerous environment stripped of means to defend himself and cut off from sources of aid. There is no sufficiently culpable affirmative conduct. Andrew went to school. No state actor placed Andrew in a "unique, confrontational encounter" with a violent criminal. *Cornelius,* 880 F.2d at 359. No official in the performance of her duties abandoned him in a crack house or released a known criminal in front of his locker. There is no suggestion that the school district or principal fostered or tolerated anarchy at Smith High – the ID badges and metal detectors permit the opposite inference. Even if the deployment of such security measures was haphazard or negligent, it may not be inferred that the conduct of the defendants rose to the level of deliberate indifference. As in *Leffall,* the most that may be said of defendants' ultimately ineffective attempts to secure the environment is that they were negligent, but not that they were deliberately indifferent. *See also Graham v. Indep. Sch. Dist. No. I-89,* 22 F.3d 991, 995 (10th Cir.1994); *compare Salas v. Carpenter,* 980 F.2d 299 (5th Cir.1992). On the contrary, the facts here pleaded suggest only that Andrew was the tragic victim of random criminal conduct rather than of school officials' deliberate, callous decisions to interpose him in the midst

of a criminally dangerous environment. Appellant's complaint, in short, does not suffice to plead that Andrew was the victim of state-created danger.

2. *Constitutional "Special Relationship"*

Although Gaston's death was not a result of an unconstitutional state-created danger, this does not necessarily preclude the broader theory of liability, premised on *DeShaney*, if a "special relationship" exists between the plaintiff and the state. In that case, the Supreme Court held that a minor could not maintain a § 1983 action against Winnebago County and its social services department or employees for serious injuries inflicted by his father after a county caseworker returned DeShaney to his father's custody and allegedly knew or should have known that the father would be violent. The Court concluded that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197, 109 S.Ct. at 1004. The Court rejected the contention that a "special relationship," carrying affirmative constitutional obligations toward the child, existed by virtue of the social welfare services the state provided. Such affirmative obligations of care and protection arise only when the state "takes a person into its custody and holds him there against his will." *Id.* at 199-200, 109 S.Ct. at 1005-06 (citing *Youngberg v. Romeo*, 457 U.S. 307, 317, 102 S.Ct. 2452, 2459, 73 L.Ed.2d 28 (1982) (institutionalized mentally ill) and *Estelle v. Gamble*, 429 U.S. 97, 103-04, 97 S.Ct. 285, 290-91, 50 L.Ed.2d 251 (1976) (prisoners)). The district court here concluded, as has every circuit court that

has considered the issue, that *DeShaney* forecloses a constitutional claim on behalf of Andrew Gaston for affirmative protection while at school. *See, e.g., Maldonado v. Josey*, 975 F.2d 727, 730-33 (10th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993); *Dorothy J. v. Little Rock Sch. Dist.* 7 F.3d 729, 732 (8th Cir.1993); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1369-72 (3rd Cir.1992) (en banc), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir.1990).

Our court recently declined to address whether a "special relationship" imposes affirmative constitutional duties of care on public schools. *Doe v. Taylor ISD*, 15 F.3d 443, 451 n. 3 (5th Cir.1994) (*en banc*); *Leffall*, 28 F.3d at 528-29.[6]

As in *Doe* and *Leffall*, we find it unnecessary to decide the "special relationship" issue in this case. We agree with the district court's conclusion on somewhat different grounds than it expressed. While a persuasive argument can be made for applying a *DeShaney* "special relationship" in some measure to public school students who are forced by compulsory education laws to attend

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[6] In *Walton v. Alexander*, 20 F.3d 1350 (5th Cir. 1994), this court held that a "special relationship" was created between the supervisor of a Mississippi custodial school for deaf children and one of the students. The panel opinion has been vacated by the grant of rehearing *en banc*. *See* Fifth Circuit Internal Operating Procedure associated with F.R.A.P. 35. Additionally, for the reasons stated in *Leffall*, *Walton* is distinguishable.

school and have no choice among public schools[7], even under such a legal regime the appellant's claim would

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[7] It is Texas law that, with few exceptions, students are required to attend school until they reached the age of 17. *See* Tex.Educ.Code Ann. § 21.032 (Vernon 1987 & Supp.1993). *See also* Tex.Educ.Code Ann. § 21.033 (exemptions from compulsory attendance requirements). Further, Texas law requires students usually to attend the public school, often a neighborhood school, designated by the district. *See* Tex.Educ.Code Ann. § 21.032(a) (Vernon Supp.1993). State law places the school *in loco parentis* during ordinary school hours and during the conduct of certain school activities. *See, e.g., Mercer v. State,* 450 S.W.2d 715 (Tex.Civ.App. – Austin 1970, error dism'd as moot). Notwithstanding similar laws in other states, four courts of appeals have held that a student is not "in custody" within *DeShaney.*These courts reason that custody in *DeShaney* meant such an involuntary, full-time physical restraint and superintendence as prevents a person from otherwise independently providing for his needs and safety. *See Dorothy J. v. Little Rock Sch. Dist.,* 7 F.3d 729 (8th Cir. 1993); *Maldonado v. Josey,* 975 F.2d 727, 731 (10th Cir. 1992); *D.R. v. Middle Bucks Area Vocational Technical Sch.,* 972 F.2d 1364, 1370-72 (3d Cir.1992); *J.O. v. Alton Community Unit Sch. Dist. 11,* 909 F.2d 267, 272 (7th Cir.1990). Public school attendance is deemed "voluntary" because parents are permitted to withdraw their students from the public schools. Further, parents remain the principal caretakers of their children even though they are housed at school for at least six to eight hours daily.

The fact is, however, that the state's custody of children in public schools is more comprehensive than is its intervention in family affairs via noncustodial welfare services. Such services often involve sporadic, intermittent contact with clients on a schedule that may not be predictable. Social workers provide valuable services to their un-institutionalized clients, but they cannot and do not tend to them continuously nor do they necessarily rely upon state-managed facilities as the locus of care. Schools, however, take care of children day after day for years *in public facilities.* Schools may be said to control children's envi-

not succeed. Andrew Gaston's death is attributable to the fortuity that an armed, violent *non-student* trespassed on campus. There can be no liability of state actors for this random criminal act unless the fourteenth amendment

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ronments to the same or even greater degree then state-sponsored foster care services, which have been held, post-*DeShaney*, to bear affirmative obligations to their client children. *See, e.g., K.H. v. Morgan, supra; Yvonne L. v. New Mexico Dept. of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992).

The argument against holding that public schools have "custody," at least for some purposes of protecting their physical well-being, appears to derive less from logic than from a pragmatic desire to limit their legal liability. As has been shown, students must attend school and may not leave without permission. To say that student attendance is voluntary because parents may elect to home-school their children or send them to a private school is lamentably, for most parents, a myth. *See D.R. v. Middle Bucks*, 972 F.2d at 1380 (Sloviter, J., dissenting). To intimate that parents retain effective responsibility for their children's well-being when the school alone makes critical decisions regarding student safety and discipline is inaccurate. To suggest that parents somehow are in a better position than the schools to protect their children from the ravages of weapons smuggled onto campus during the school day is cruelly irrational. To hope that students who are unarmed can protect themselves from the depredation of armed criminals in their midst is ridiculous. That parents yield so much of their children's care into the hands of public school officials may well be argued to place upon the officials an obligation to protect students at least from certain kinds of foreseeably dangerous harm during regular school hours.

The author of this opinion dissented in *Doe v. Taylor ISD*, 15 F.3d 443 (5th Cir.1994) (*en banc*). In suggesting that the "special relationship" theory of *DeShaney* may logically apply to public schools governed by compulsory attendance laws, I do not retreat from my reticence to expand the scope of constitutional claims, yet I feel compelled to observe the deficiencies of governing circuit caselaw.

were to make the schools virtual guarantors of student safety – a rule never yet adopted even for those in society, such as prisoners or the mentally ill or handicapped, who are the beneficiaries of a "special relationship" with the state. *See, e.g., Farmer v. Brennan*, ___ U.S. ___, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Because of our conclusion that appellant stated no § 1983 claim, we need not consider the specific grounds for potential liability of the principal or Dallas Independent School District or the question of qualified immunity.

For the foregoing reasons, the judgment of the district court is *AFFIRMED*.

GOLDBERG, Circuit Judge, dissenting:

The majority in the case before us found that a school district should not be held responsible for the reasonable safety of its students. The majority opinion holds that a student cannot recover from a public school, or school officials, for injuries sustained during school hours. I respectfully dissent.

The district court dismissed this action for failure to state a claim according to Federal Rule of Civil Procedure 12(b)(6). Dismissal is inappropriate unless the reviewing court determines that the plaintiff could not recover under any set of facts. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 523 (5th Cir.1994); *K.H. ex rel.*

Murphy v. Morgan, 914 F.2d 846, 847 (7th Cir.1990). For purposes of this review, the court should assume that the facts alleged in the plaintiff's pleadings are true. *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir.1994).

The limited pleadings in this case sketch a rough image of the "transformation of our public schools from institutions of learning into crucibles of disaffection marred by increasing violence from which anguish and despair are often brought to homes across the nation." *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991 (10th Cir.1994). Andrew Gaston, an innocent fifteen-year-old student, was shot in the head and killed while in the halls of A. Maceo Smith High School. Drumestic Contreal Brown, a non-student, took a school bus to get to the school, entered the school building, created a disturbance, and ultimately fired the shot that killed Gaston.

While this story would be tragic in any school, the trauma is magnified in this case by the apparent ineptitude and fecklessness of the school district and school officials in ensuring student safety. School policy requires students to purchase school identification badges, but there was no one to check them. The school also had metal detectors on the premises, but they were packed away in boxes. The majority opinion refuses to acknowledge that these security measures were aimed at preventing the precise incident that transpired on October 23, 1991. The purpose of these measures is clear and self-evident. The ID badges were intended to control the presence of non-students on campus, not to serve as useless decoration. The metal detectors were intended to eliminate the presence of weapons on the school grounds, not to consume space and collect dust like museum

pieces. The target of these detectors are the guns and knives fueling the violence in our schools.[1]

Both of these security measures were inadequately employed, and Brown was able to commit his fatal deed. If the school had not completely disregarded its security measures, Brown might have been prevented from roaming the school halls and his gun might have been detected. Indeed, this lawsuit might never have materialized, and Gaston would have finished his studies at A. Maceo Smith High School.

The majority and the district court concluded that the pleadings did not sufficiently allege facts or present a legal basis for recovery. I respectfully disagree on both counts.

The complaint in this case alleges sufficient facts to survive a Rule 12(b)(6) attack. In dismissing this case, the district court relied in part on *Streetman v. Jordan*, 918 F.2d 555 (5th Cir.1990). The district court essentially held that the plaintiff did not allege facts with sufficient specificity to overcome the heightened pleading requirement for

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[1] Because this case was dismissed prematurely, the plaintiff was not permitted to develop additional evidence relating to the aggregate state of affairs at the school. Inferences of safety and dangerousness require a fact-finder to examine and weigh additional evidence relating to the aggregate state of affairs at the school. Recognizing the nature of the security measures at A. Maceo Smith High School does not necessarily compel an inference of dangerousness, as the majority seems to suggest. An objectively safe school might implement security measures to maintain and safeguard its security and reputation. The purpose of a trial is to permit a fact finder to draw inferences based on evidence adduced through the discovery process.

§ 1983 claims. *See Streetman*, 918 F.2d at 557. However, the Supreme Court invalidated the heightened pleading requirement in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). *Leatherman* held that plaintiffs in § 1983 cases need only meet the pleading requirements established in Federal Rule of Civil Procedure 8(a). *Id.*, ___ U.S. at ___, 113 S.Ct. at 1161. Our system of pleading has evolved from the ancient system of the forms of action to the modern notice pleading standard. We should not return to the feudal days of microscopic analysis of pleadings, but rather embrace the present and future. The plaintiff's pleadings need only adumbrate the evidence expected in the prosecution of the case. Thus,

> "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."

Taylor v. Ledbetter, 818 F.2d 791, 794 n. 4 (11th Cir.1987), *cert. denied*, 489 U.S. 1065, 109 S.Ct. 1337, 103 L.Ed.2d 808 (1989) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Miller v. Stanmore*, 636 F.2d 986 (5th Cir.1981); *Johnson v. Wells*, 566 F.2d 1016 (5th Cir.1978). This case should not be prematurely dismissed and the plaintiff should be permitted to develop evidence to support his claims. Other courts have upheld analogous claims. *See e.g., Waechter v. School Dist. No. 14-030*, 773 F.Supp. 1005, 1010 (W.D.Mich.1991); *Lichtler v. County of*

Orange, 813 F.Supp. 1054 (S.D.N.Y.1993); *Pagano v. Massapequa Public Schools*, 714 F.Supp. 641, 643 (E.D.N.Y.1989); *cf. Taylor v. Ledbetter*, 818 F.2d 791, 793 (11th Cir.1987).

The majority posits and refutes two potential theories for recovery in this case. I find the majority's application of the facts to each theory problematic.

I.

The majority recognizes that under the due process clause of the Fourteenth Amendment, a state actor is held accountable for foreseeable injuries when it creates or permits a dangerous situation. *See Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir.1992). This principle has been labeled the state-created danger doctrine. Although the plaintiff's pleadings set forth the requisite elements of a state-created danger claim, the majority not only refuses to find them but also denies the plaintiff the opportunity to demonstrate the state-created danger at A. Maceo Smith High School on October 23, 1991.

The majority distills three elements that constitute the state-created danger doctrine from prior cases. The first element is whether the environment was dangerous. The second is whether the state actors knew the environment was dangerous. The final element is whether the state actors created an opportunity that would not otherwise have existed for the injury to transpire. The requisite allegations in the pleadings will be examined below.

The state forced Gaston to attend A. Maceo Smith High School through its compulsory education laws. *See* Tex.Educ.Code Ann. § 21.032(a) (Vernon 1987 &

Supp.1993). The majority points out that to claim Gaston attended school voluntarily is to deny reality.[2] *See* Majority Op. at 780-81, n. 7; *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364, 1380 (3rd Cir.1992) (Sloviter, C.J., dissenting), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993) ("The compulsory nature of public school attendance is not lessened by the fact that a few fortunate students have the option to attend private school or be educated at home.")[3] A. Maceo Smith High School was arguably dangerous on October 23, 1991. While schools may not be *per se* dangerous, the plaintiff should be given an opportunity to prove that A. Maceo Smith High School was dangerous. The very limited discovery in this case reveals past instances of school violence. Additional evidence and testimony might have further indicated dangerousness.[4] The factfinder, after a

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[2] Thus, this court's decision in *Leffall* is clearly distinguishable from the instant case. *Leffall v. Dallas Independent Sch. Dist.*, 28 F.3d 521 (5th Cir.1994). We are not attending an after-school dance in this case, where students must pay for the privilege to attend, as was the case in *Leffall*. In this case, we are attending school, studying our books, and attendance is mandatory.

[3] The Supreme Court has gone further, stating that

> "[l]aw reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."

Lee v. Weisman, ___ U.S. ___, ___, 112 S.Ct. 2649, 2658, 120 L.Ed.2d 467 (1992).

[4] The mere presence of trained adults on school grounds does not negate the potential dangerousness of the school. If trained individuals were deliberately indifferent to the plight of the students, the school might be as dangerous or more dangerous than if they were not present. The parents may have relied upon the presence of trained adults, and therefore not

trial, should have considered the evidence and determined whether A. Maceo Smith High School was dangerous or safe on October 23, 1991.

Without factual development, we should not pass with finality on the knowledge and level of culpability of the school district and officials in this case. The majority's interpretation of "actual knowledge" seems too cramped in view of § 1983 jurisprudence. The Supreme Court and this court have held the liability may attach to the state through inaction or nonfeasance as well as through action and malfeasance. *Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989) (holding that a failure to promulgate a policy may demonstrate deliberate indifference and be grounds for liability under § 1983); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1066, 122 L.Ed.2d 371 (1993) ("We . . . hold that a school official's liability arises . . . when the student shows that the official, *by action or inaction*, demonstrates a deliberate indifference to his or her constitutional rights.") (emphasis supplied).[5] We stated in *Gonzalez v. Ysleta Indep. Sch. Dist.* that

> "[t]he 'deliberate indifferent' requirement permits courts to separate *omissions* that 'amount to

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pressed for additional security measures. "Failing to act may, under certain circumstances, be more detrimental than acting." *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791, 800 (11th Cir.1987); *see also P.L.C. v. Housing Authority*, 588 F.Supp. 961 (W.D.Pa.1984) (holding that a duty arose through detrimental reliance).

[5] *See generally, Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 Univ.Chi. L.Rev. 1048 (1986).

> an intentional choice' from those that are merely 'unintentionally negligent oversight[s].' "

996 F.2d 745, 756 (5th Cir.1993) (emphasis supplied) (quoting *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir.1992)); *see also Salas v. Carpenter*, 980 F.2d 299, 307 (5th Cir.1992). The deliberate indifference standard is a high legal threshold,[6] used to distinguish simple negligence from the type of willful blindness that is so extreme that it qualifies as active conduct for determining culpability. *Id. See also Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 722-23 (4th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992) (citing cases of deliberate indifference); *Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1145 (3d Cir.1990); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir.1979) (discussing liability based on gross negligence and reckless disregard for the safety of others). The language found in these opinions demonstrates that the defendants here may be liable under § 1983 for inaction and failure to obtain knowledge about

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[6] The deliberate indifference standard is difficult to meet for several reasons. One reason is to prevent the Fourteenth Amendment from becoming a "font of tort law." *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) (citations omitted). Another reason is to protect state actors from excessive financial exposure. *See Canton v. Harris*, 489 U.S. 378, 391-92, 109 S.Ct. 1197, 1206, 103 L.Ed.2d 412 (1989). The latter seems to be one of the majority's primary concerns. *See* Majority Opinion at 780-81 & N. 7. The proper way to address this concern is through the use of a high culpability requirement and requiring that the deliberate indifference "be closely related to the ultimate injury." *Canton*, 489 U.S. at 391, 109 S.Ct. 1206. Insulating deliberately indifferent school districts and officials by preventing student suits goes to far to protect the public fisc at the expense of defenseless school children.

the school's security. The plaintiff effectively alleged that the school officials were deliberately indifferent to the danger at the high school, in that they knew or should have known about the environment at A. Maceo Smith High School. At this stage of the litigation, it is understandable that the plaintiff does not have an abundance of evidence of the nebulous mental state of the officials. *Cf. Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 640 (5th Cir.1985) (discussing the difficult task of proving defendants' mindsets). However, that does not justify denying the plaintiff his day in court to attempt to show what may be difficult but still possible to prove. Furthermore, there is no evidence in this record to support the majority's assertion that the risk of a non-student invader was unforeseeable by the defendants. The majority claims it is inappropriate to draw an inference of knowledge from the security measures in this case, because such an inference would discourage schools from taking steps to ensure student safety in the future. However, it is just as inappropriate to draw an inference of safety from these security measures. Furthermore, the majority's position effectively rewards official ignorance and irresponsibility. The courts should encourage student safety, not half-hearted security policies. In addition, even without an inference of dangerousness or knowledge from these measures,[7] there is a past history of

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[7] Such an inference does not require a great leap of faith. The ID badge policy seems to be aimed at distinguishing students who belong on campus from strangers, and the metal detectors are a step in eliminating the presence of weapons from school grounds. Taken together, these two measures seem to indicate that the presence of armed non-students was, or should

firearms and violence at A. Maceo Smith High School which, in conjunction with other evidence that might have come to light through further discovery, could have proved whether the school was the [sic] dangerous or safe.[8] Based on this record, we cannot know whether A. Maceo Smith High School was a paragon of security or a "snake pit."[9]

Finally, the majority requires an extreme showing of affirmative action from school officials, as it concludes that the defendants cannot be liable because they "did not release a known criminal in front of [Gaston's] locker." Majority Op. at 779. This position depreciates § 1983.[10] If the majority's logic were followed, then a

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have been, foreseeable to the school officials.

[8] *See* Answers to Interrogatories. The only discovery allowed in this case was in the form of one set of interrogatories.

[9] *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982).

[10] Some courts have implied that the action/inaction distinction is crucial in determining whether the students may recover for injuries from the school districts and officials. *See, e.g., D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364, 1373-75 (3d Cir.1992); *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990). However, other cases have criticized a curtailed and limited view based on an act/omission distinction because it leads to contrived and artificial results.

> "We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him

school that was deliberately indifferent to the risk of fire would be immune to suits for fire related injuries as long as the principal did not strike the match. This simply cannot be true. The state need not be the last link in the causal chain to be liable for injuries. In *Estelle,* the Court found a duty for the state to provide medical care for injuries that were not caused by a state actor, but rather through the performance of a work assignment. *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). In *Youngberg,* the Court acknowledged that the institutionalized patient has a right to medical care even though the state did not cause his injuries. *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); *see also Lichtler v. County of Orange,* 813 F. Supp. 1054, 1056 (S.D.N.Y.1993) (stating that a county could [sic] liable for student injuries resulting from a tornado which struck during school hours). If the state places an individual in a precarious situation, it cannot avoid liability if the peril materializes in the form of injury. Foreseeability is a question of fact and is not to be answered by speculative conclusions.

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into a snake pit."
Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir.1982). *See also White v. Rochford,* 592 F.2d 381 (7th Cir.1979) ("[I]t seems incongruous to suggest that liability [under § 1983] should turn on the tenuous metaphysical construct which differentiates sins of omission and commission."). Indeed, the Supreme Court stated deliberate indifference may result from acts or omissions. *Estelle,* 429 U.S. at 104-05, 97 S.Ct. at 291.

II.

The majority presents and rejects the notion that a public school owes its students any duty to maintain a reasonably safe environment in which to conduct classes. The majority bases this conclusion primarily on *DeShaney v. Winnebago County Dep't Soc. Serv's.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) and some circuit cases interpreting *DeShaney*. However, *DeShaney* does not foreclose the possibility of some obligation to protect students from violence in public schools. The *DeShaney* Court stated that when the state takes custody of an individual, an affirmative duty arises under § 1983 to ensure the individual's safety and well-being. 489 U.S. at 199-200, 109 S.Ct. at 1005. Thus, the court's inquiry is two-fold. The court must determine whether Gaston was in state custody, and if so, whether the state breached its duty to safeguard him.

The majority found that Gaston was not in state custody. Determining whether an individual is in state custody is typically accomplished by examining whether the state has isolated the individual from sources of private aid, or when,

> "the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for basic human needs – *e.g.*, food, clothing, shelter, medical care, and *reasonable safety*. . . . "

DeShaney, 489 U.S. at 200, 109 S.Ct. at 1005 (citations omitted) (emphasis supplied). A "special relationship" between the state and the individual arises when the state

takes the person in custody.[11] In this case, the majority finds that Gaston was not in custody because he could go

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[11] The term "special relationship" has become talismanic and complicated. *Archie v. Racine*, 847 F.2d 1211, 1223 (7th Cir.1988). This court has expressly avoided determining whether a school has a special relationship with its students. *See Leffall*, 28 F.3d at 528-29; *Doe v. Taylor Independent Sch. Dist.*, 15 F.3d 443, 451 n. 3. Some courts have noted difficulty with the concept.

> "The contours of what constitutes a 'special relationship' between a municipality, acting through its officials, and its citizens are hazy and indistinct."

Ellsworth v. Racine, 774 F.2d 182, 185 (7th Cir.1985). However, there are several examples of special relationships from prior cases. *See, e.g., Estelle*, 429 U.S. 97, 103-04, 97 S.Ct. 285, 290-91 (state owes duty to prison inmates); *Youngberg*, 457 U.S. 307, 315-16, 102 S.Ct. 2452, 2458 (state owes duty to mental patients). Indeed, at least two circuits have intimated that a special relationship is not required to find custody or a duty to protect individuals.

> "Nothing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates. . . . Liability of municipal policymakers for policies or customs chosen or recklessly for maintained is not dependent upon the existence of a 'special relationship' between the municipal officials and the individuals harmed."

Stoneking v. Bradford Area School Dist., 882 F.2d 720, 725 (3d Cir.1989) (citing *Canton v. Harris*, 489 U.S. 378, 387, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989) and *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir.1989), *cert. denied*, 493 U.S. 820, 110 S.Ct. 75, 107 L.Ed.2d 42 (1989)); *see also Jensen v. Conrad*, 747 F.2d 185, 194 (4th Cir.1984), as discussed in *Swader v. Virginia*, 743 F.Supp. 434, 439 (E.D.Va.1990) (stating *Jensen* survives *DeShaney*) ("a right to affirmative protection need not be limited by a determination that there was a 'custodial relationship.' The *Fox* [*v. Custis*, 712 F.2d 84 (4th Cir.1983)] court ruled that a right to protection

home at the end of the day and he was not locked in a cell. However, "the concept of 'custody' is not so rigid as to be defined only in terms of a prison or mental hospital." *Swader v. Virginia*, 743 F.Supp. 434, 439 (E.D.Va.1990).[12] Gaston's parents may have been responsible for his food, clothing,

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could arise from a custodial *or other relationship.*") (emphasis original).

[12] There are may examples of special relationships and custody in cases applying § 1983. *See e.g., Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 723-34 (3d Cir. 1989); *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir.1982), *cert. denied*, 460 U.S. 1069, 103 S.Ct. 1524, 75 L.Ed.2d 947 (1983) (finding that juveniles in boarding school in state custody). Courts have found a duty when the state takes a child from the natural parents and places the child under state supervision in order to secure an adoption. *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir.1990) (a "special relationship [arose] when [the state] removed [children] from their natural homes and placed them under state supervision"); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir.1990); *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir.1987) (en banc). A duty arises to protect prison inmates from other inmates. *DeMallory v. Cullen*, 855 F.2d 442, 445 (7th Cir.1988). A special relationship was found between the state and a confidential informant's wife. *G-69 v. Degnan*, 745 F.Supp. 254, 265 (D.N.J.1990). *See also Fox v. Custis*, 712 F.2d 84, 88 (4th Cir.1983) ("[a constitutional right to protection by the state] may arise out of special custodial or other relationships created or assumed by the state"); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982); *Simmons v. Philadelphia*, 947 F.2d 1042, 1067 (3rd Cir.1991) (state owed duty of safety to pre-trial detainee due to custody); *Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir.1989) (state owed duty to suspect in private club based on functional custody by police officer); *Lichtler v. County of Orange*, 813 F.Supp. 1054, 1056 (S.D.N.Y.1993) ("Since power implies responsibility, where governmental agencies or entities utilize sovereign compulsion to exercise coercive powers, a correlative duty exists of due care toward those subjected to such compulsion.").

shelter, and medical care, but both Gaston and his parents relied on the school to ensure his safety so that he might return home.[13] Thus, this case is analogous to *Griffith v. Johnston,* where this court found that the state owed a duty to children removed from their homes and placed under state supervision. 899 F.2d 1427, 1439 (5th Cir.1990).[14] The parents clearly entrusted their children's safety to the school

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[13] *Maldonado v. Josey,* 975 F.2d 727, 735 (10th Cir.1992) ("I cannot fathom who, other than a teacher or other school staff member, is capable of ensuring the 'reasonable safety' of school-children during the school day and class periods.") (Seymour, concurring).

[14] Other circuits have followed this approach in the foster care context.

> "Here, in contrast, the state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in jail or prison in which his health or safety would be endangered, without violating his rights either under the cruel and unusual punishments clause of the Eighth Amendment (held applicable to the states through the Fourteenth Amendment) if he was a convicted prisoner. . . . In either case the state would be doer of harm rather than merely an inept rescuer, just as the Roman state was a doer of harm when it threw Christians to lions."

K.H. ex rel. Murphy v. Morgan, 914 F.2d 846, 849 (7th Cir.1990) (citations omitted). *See also Yvonne L. v. New Mexico Dep't of Human Serv's.,* 959 F.2d 883 (10th Cir.1992) (holding that children in the state's custody are owed an affirmative duty of protection); *Doe v. New York City Department of Soc. Serv's.,* 649 F.2d 134 (2d Cir.1981), *cert. denied,* 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

district. Indeed, state law places a school *in loco parentis*. *See* Majority Op. at 780-81 n. 7. Schools often use their role as a justification for their actions affecting a student's rights. *See New Jersey v. T.L.O.*, 469 U.S. 325, 336-41, 105 S.Ct. 733, 739-42, 83 L.Ed.2d 720 (1985) (recognizing a school's "need to maintain an environment in which learning can take place"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986). Under the rule pronounced by the majority today, parents who want to attempt to protect their children from any harm will have to take turns standing guard at the school building and playground.

At this stage in the lawsuit, it is premature to suggest whether the alleged failures on the part of the school district and school officials should be characterized as negligent, grossly negligent, callously indifferent, or any other legal label imposing liability. Let us return to our role of reviewing the law, and allow the fact-finder to determine the facts. Pleading strictures should not be used to prevent cases where the pleadings do not provide extremely detailed factualistic assertions. Let us take steps to ensure that our schools do not become shooting galleries or places where criminals are free to roam and terrorize the student body. Our schools should be places of learning, and personal safety is a vital component of a learning environment.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1214

ANDREW JOHNSON, Individually and as heir to and/or personal representative of the estate of Andrew Gaston, his deceased son,

Plaintiff-Appellant,

versus

DALLAS INDEPENDENT SCHOOL DISTRICT AND DONNIE BREEDLOVE,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(December 14, 1994)

Before GOLDBERG, JONES and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

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Rev. 7/1/94